

No. 2305

United States

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Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and Ex-
officio Collector of Poll Tax,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska,
Division No. 1.

FILED

AUG 27 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff and Appellant,
vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant and Appellee.

SHACKLEFORD & BAYLESS and Z. R. CHENEY,
Counsel for the Plaintiff and Appellant, Res-
idents of Juneau, Alaska.

J. W. RUSSELL, of Juneau, Alaska, Counsel for the
Defendant and Appellee.

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Amended Complaint.

Comes now the above-named plaintiff and for cause of action against the above-named defendant complains and alleges as follows:

I.

That the plaintiff is a male citizen of the United States, a resident of the town and precinct of Juneau, Territory of Alaska, over the age of twenty-one years, and under the age of fifty years.

II.

That on August 24, 1912, the Congress of the United States passed and the President of the United States approved a certain act entitled: "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," which said act is found in the 37th volume of the Statutes at Large of the United States at page 512; that prior to the passage of said act no legislative assembly had been provided for by law for the Territory of Alaska and no legislative assembly had met in the Territory of Alaska; that the said act provided that the first session of the said legislative [1*] assembly should convene at the city of Juneau, Alaska, on the first Monday in March, 1913, which was the 3d day of March, 1913; that the said act further provided that no person holding a commission or appointment under the United States

*Page-number appearing at foot of page of original certified Record.

shall be a member of the legislature or shall hold any office under the government of said Territory.

III.

That the defendant, John B. Marshall, holds a commission and appointment under the laws of the United States, to wit: as United States Commissioner for the District of Alaska, Juneau Precinct, and that the said defendant, under the act hereinafter mentioned, is also attempting to hold an office under the government of the Territory of Alaska and attempting to exercise certain duties of said office, to wit: the office of Ex-officio Collector of Poll Taxes for the Territory of Alaska;

IV.

That subsequent to the 2d day of March, 1913, the Territorial Assembly for the District of Alaska passed a certain act entitled "An Act to impose a poll tax upon male persons in the Territory of Alaska and providing means for its collection," which said act was approved on the 1st day of May, 1913. Plaintiff alleges that it was the intention of the said legislature by the said act to provide for the imposition and collection of said poll tax after the 1st day of March, 1914, and not prior thereto; that the said act is in words and figures as follows, to wit:

"Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or Territorial charges,

within the [2] Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.

Sec. 2. That the commissioner of each precinct in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct, or if there be no newspaper, then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the

time in which such notice specifies.

Sec. 3. The tax herein provided for shall be paid between the first Monday in the month of April and the first Monday in the month of August in each year.

Sec. 4. It shall be the duty of the commissioner to receipt to each person upon payment of the poll tax herein provided for and the receipt so delivered shall be the only evidence of payment.

Sec. 5. Every person indebted to one who neglects or refuses, after demand, to pay a poll tax becomes liable therefor and must pay the same for such other person after service upon him by the Commissioner of a notice in writing stating the name of such person.

Sec. 6. Every person paying the poll tax of another may deduct the same from any indebtedness to such other person. The commissioner must demand payment of poll tax from every person liable therefor, and on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person, and any property thus seized shall be sold as provided by law for the sale of personal property on execution except that three days' notice of the time and place of the sale shall be sufficient.

Sec. 7. It shall be the duty of the commissioner to collect and enforce the collection of all unpaid taxes by giving notice in writing to such delinquent, personally or by mail, and such de-

linquent shall pay a penalty of one dollar in addition to such tax.

Sec. 8. The Territorial Treasurer must, before the first Monday in March in each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts, in book form with stubs numbered the same as the receipts, of one hundred in each book, a sufficient number [3] for each commissioner. The form of such receipts and stubs shall be prescribed by the Territorial Treasurer and shall be approved by the Governor of the Territory.

Sec. 9. The commissioner shall, before entering upon the performance of his duties as herein prescribed, execute a bond to the Territory of Alaska in the sum to be fixed by the Territorial Treasurer which shall not be less than double the amount of money which will probably come into his hands under this act during any one year. Said bond shall be executed with two or more sureties and the same shall be approved by the Territorial Treasurer; said bond shall be conditioned for the faithful discharge of the duties of his office and the said bond shall be filed in the office of the Territorial Treasurer.

Sec. 10. The commissioner shall keep an accurate account of all moneys received by him under the provisions of this act, and he shall, not later than the first day in September in each year, transmit the same to the Territorial Treasurer. Such statement shall be verified by the affidavit of the commissioner to the effect that

the same is in all respects a full and true statement of all moneys received by him under the provisions of this act; and after the first day of September in each year, the commissioner shall, at least once in three months, file an additional statement setting forth any taxes and penalties collected by him under the provisions of this act during such period of three months, and shall transmit such moneys to the Territorial Treasurer; such supplemental statement shall be made and verified, as herein provided for the first statement.

The commissioner, for services rendered under the provisions of this act, shall receive as full compensation fifteen per centum of all taxes collected, except those collected by action, civil or criminal, and twenty per centum of all delinquent taxes and penalties.

Sec. 11. The Territorial Treasurer shall make and prescribe all rules and regulation to carry into effect the provisions of this act.

Sec. 12. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not more than one hundred dollars nor less than five dollars, or imprisoned in the federal jail for not more than thirty days nor less than one day.

Sec. 13. This bill shall take effect from and after its passage."

IV $\frac{1}{2}$.

That prior to the third day of July, 1913, there was

no Treasurer in and for the Territory of Alaska.

V.

That the said defendant, on or about the 25th day of July, 1913, caused to be published in the "Daily Alaska Empire," a newspaper published in Juneau, Alaska, a certain notice, which is in words and figures as follows, to wit: [4]

POLL TAX NOTICE.

Notice is hereby given that the poll tax provided for by Chapter 54 of the Session Laws of Alaska, 1913, is due and payable on or before Monday, August 4, 1913, and the same will become delinquent on and after Tuesday, August 5, 1913. All persons are hereby warned to pay said poll tax, viz., \$4.00, on or before August 4, 1913, and that in case of failure so to do a penalty of \$1.00 in addition to said \$4.00 will be required of such persons so delinquent. Any person failing to pay said poll tax on or before Monday, August 4, 1913, will be guilty of a misdemeanor and liable to a fine of from \$5.00 to \$100.00 or imprisonment from one to thirty days.

Payment of said poll tax can be made to the undersigned at his office in the court house at Juneau, Alaska.

(Signed) JOHN B. MARSHALL,
U. S. Commissioner, Juneau Precinct, First
Division, District of Alaska.

VI.

That no provision is made in said act or any of the laws of the United States or the laws of the Territory of Alaska for the recovery of taxes illegally levied

and collected and that the defendant herein is attempting and threatening to collect a poll tax from this plaintiff for the year 1913 contrary to the spirit and intention of the act of the Legislature above set forth, and is attempting and threatening to collect said tax as aforesaid from this plaintiff and all others similarly situated who reside within Juneau Precinct, Territory of Alaska, and that the said defendant unless restrained by an order of this Court will proceed to collect this poll tax and threatens to collect the same by proceedings, both civil and criminal. That the defendant has threatened the plaintiff that unless the plaintiff pays to him, the defendant, the alleged poll tax above described for the year 1913 forthwith, he will cause a complaint to be filed against the plaintiff and cause the plaintiff to be arrested and brought before him and adjudged guilty of failing to pay the said poll tax and enter judgment against the plaintiff in the court of the defendant for the alleged violation of said act; [5]

VII.

That the acts and threatened acts of the said defendant herein complained of are unlawful, invalid and without authority of law for the reason that it appears upon the face of said act that the poll tax in said act provided for and levied is not to be collected during the year 1913 or before the first Monday in April, 1914, for the reason that certain official acts necessary to be done and performed by the said defendant prior to the collection of said tax have not been by him performed, which acts and conditions

precedent towards the collection of said tax are as follows:

a. No list of names of all persons residing within his precinct subject to the tax has been compiled by said defendant prior to March 1, 1913, or at all;

b. That no notice to all persons subject to said tax has been by said defendant given, as provided in said act, prior to the first Monday in April, 1913;

c. That no blank receipts and stubs, as provided for in section 8 of said act, have been delivered by the Treasurer of the Territory of Alaska to said defendant prior to the first Monday in March, 1913;

d. That no bond executed by the defendant to the Territory of Alaska, as provided for by Section 9 of said act, was by said defendant executed and delivered, as in said section provided for, prior to the first Monday in March, 1913;

VIII.

That the defendant herein threatens, pursuant to procedure laid down in section 6 of the said act, to take the property of the plaintiff and seize the same and sell the same upon three days' notice, but without any procedure [6] for the condemnation or distraint of the said property and without other process of law, and plaintiff alleges that by reason thereof the plaintiff will be deprived of his property without due process of law, contrary to Section 1, Article 14, of the Constitution of the United States;

IX.

That the act above mentioned is void, for the reason that the same is in violation of the Organic Act of the Territory of Alaska (Compiled Laws of

Alaska, page 272, section 418), because the defendant is holding the office of United States Commissioner under appointment from the United States and is also designated as Poll Tax Collector under said Act;

X.

That unless this Court lends to the plaintiff the aid of its writ of injunction, the proceedings herein threatened by the defendant will result in a multiplicity of suits against this plaintiff as well as all others similarly situated;

XI.

That the plaintiff is without plain, speedy and adequate remedy at law, and will suffer great, immediate and irreparable injury, and will be compelled to pay said tax without any method or remedy for the recovery of the same and under duress and threat of imprisonment and trial before the defendant, the same officer who is engaged in the collection of said tax, and will be deprived of his liberty and property without due process of law unless a temporary injunction is issued herein prohibiting the defendant from the acts and threatened acts herein complained of, and unless upon final hearing a final and permanent injunction be granted enjoining the defendant from collecting the said tax. [7]

WHEREFORE plaintiff prays that a temporary restraining order be issued herein restraining the defendant from committing the acts complained of, and that hereafter a temporary injunction be issued during the pendency of this action restraining the defendant from doing the acts complained of herein, and, upon final hearing, a permanent injunction be

granted prohibiting and restraining the defendant from doing the acts complained of and threatened herein, and for such other and further relief as to the Court may seem meet and proper, and for plaintiff's costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

I, Arthur B. Callaham, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing complaint and know the contents thereof and believe the same to be true.

A. B. CALLAHAM.

Subscribed and sworn to before me this 4th day of August, 1913.

[Seal]

W. S. BAYLESS,
Notary Public for Alaska.

My Commission expires Dec. 10, 1913. [8]

*In the District Court for the District of Alaska,
Division No. 1 at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Demurrer.

The defendant above named hereby *demurrers* to
the amended complaint of the plaintiff herein upon
the ground that said amended complaint does not
state facts sufficient to constitute a cause of action.

J. W. RUSSELL,
Defendant's Attorney.

[Endorsed]: Filed in the District Court, District
of Alaska, First Division. Aug. 6, 1913. E. W.
Pettit, Clerk. By ————, Deputy. [9]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Judgment.

This action having been brought to restrain the defendant from collecting poll tax under Chapter 54 of the laws of 1913; and the defendant having appeared and demurred to the complaint herein; and said demurrer having come on regularly for argument, and argument had thereon; and said demurrer having been duly sustained; and the plaintiff, leave having been granted therefor, having filed his amended complaint herein; and the defendant having duly demurred to such amended complaint; and said demurrer having been duly brought on for argument, and argument had thereon; and said demurrer to said amended complaint having been sustained;

NOW, on motion of J. W. Russell, attorney for the defendant herein;

It is hereby ORDERED, ADJUDGED and DE-

CREED that said amended' complaint be and the same hereby is dismissed.

And it is hereby further ORDERED, ADJUDGED and DECREED that the defendant above named have and recover of [10] and from the above-named plaintiff, ARTHUR B. CALLAHAM, his costs and disbursements herein to be taxed.

Dated August 6th, 1913.

FRED M. BROWN,
Judge.

To which Judgment the plaintiff excepts and his exception is allowed.

FRED M. BROWN,
Judge.

Entered Court Journal No. J, page 109.

Filed in the District Court, District of Alaska, First Division. Aug. 6, 1913. E. W. Pettit, Clerk. By H. Malone, Deputy.

No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham, for Himself, etc., Plaintiff, vs. John B. Marshall, as, etc., Defendant. Judgment. J. W. Russell, Defendant's Attorney, Juneau, Alaska. [11]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Petition for Appeal.

Comes now the above-named plaintiff and appellant, Arthur B. Callaham, and conceiving himself aggrieved by the judgment of this Court entered on the 6th day of August, 1913, sustaining the demurrer to plaintiff's amended complaint and ordering the same dismissed at plaintiff's costs, hereby petitions said Court for an order allowing this plaintiff and appellant to prosecute an appeal from said judgment to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit at Seattle, Washington, under and according to the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which said plaintiff and appellant shall give upon said appeal, and that a transcript of the record, proceedings and papers upon which said judgment was made,

duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appeal be heard at the next term of said Court at Seattle, State of Washington.

Dated August 8, 1913.

SHACKLEFORD & BAYLESS,

Z. R. CHENEY,

Attorneys for Plaintiff and Appellant.

[Order Granting Petition for Appeal.]

The foregoing petition for appeal is granted and the [12] claim of appeal herein made is allowed.

Dated August 8th, 1913.

FRED M. BROWN,

Judge.

Due service of a copy of the within is admitted this 8th day of August, 1913.

J. W. RUSSELL.

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. By ————, Deputy.

[Endorsed]: Original No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham, et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Petition for Appeal. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

[13]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, Arthur B. Callaham, as principal, and
Henry Shattuck, as surety, are held and firmly bound
unto John B. Marshall, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and Ex-Officio
Collector of Poll Tax, jointly and severally, in the
sum of two hundred and fifty dollars (\$250.00), to be
paid to the said John B. Marshall, as U. S. Commis-
sioner for Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax, his successors or
assigns, to which payment, well and truly to be made,
we bind ourselves, our heirs, executors and adminis-
trators, jointly and severally, firmly by these pres-
ents.

Sealed with our seals and dated this 8th day of
August, 1913.

Whereas, lately at the session of the District Court

for the District of Alaska, Division No. 1, at Juneau, in a suit pending in said court between Arthur B. Callaham, for himself and all male persons residents of Juneau Precinct, [14] Territory of Alaska, over the age of twenty-one years and under the age of fifty years, plaintiff and appellant, and John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska and Ex-Officio Collector of Poll Tax, defendant and appellee, a judgment and decree was rendered against the said plaintiff on the 6th day of August, 1913, wherein and whereby it was ordered, adjudged and decreed that the demurrer of said defendant to the amended complaint of the plaintiff herein be sustained and the said amended complaint dismissed at plaintiff's costs; that said plaintiff and appellant having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said judgment and decree, and a citation directed to the said defendant and appellee having been issued citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at Seattle, Washington;

Now, the condition of the above obligation is such, that if the said Arthur B. Callaham shall prosecute said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his appeal good, then this obligation to be

void; otherwise to remain in full force and effect.

ARTHUR B. CALLAHAM,
Plaintiff and Appellant.
HENRY SHATTUCK,
Surety.

Sufficiency of sureties on foregoing bond approved
this 9th day of August, 1913.

FRED M. BROWN,
Judge. [15]

United States of America,
District of Alaska,—ss.

Henry Shattuck, being first duly sworn, deposes
and says: That he is a resident of the town of Juneau,
District of Alaska, and is not a counsellor, attorney,
marshal, clerk of any court, or other officer of any
court; that he is worth the sum of five hundred dol-
lars, exclusive of property exempt from execution
and over and above all just debts and liabilities.

HENRY SHATTUCK.

Subscribed and sworn to before me this 8th day of
August, 1913.

W. S. BAYLESS,
Notary Public for Alaska.

My Commission expires Dec. 10, 1913.

Original. No. ——. Filed in the District Court,
District of Alaska, First Division. Aug. 9, 1913. E.
W. Pettit, Clerk. By H. Malone, Deputy.

In the District Court for the District of Alaska,
Division No. 1, at Juneau, Arthur B. Callaham
et al., Plaintiffs, vs. John B. Marshall, as U. S. Com-
missioner, etc., Defendant. Bond on Appeal.

Shackleford & Bayless, Attorneys for Plaintiff.
Office, Juneau, Alaska. [16]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Order Settling Record on Appeal.

This matter coming on for hearing on the 6th day of August, 1913, upon the amended complaint of the plaintiff herein, and the defendant having filed a demurrer to said amended complaint, and the Court having on said date sustained said demurrer and having entered judgment thereon dismissing said amended complaint at plaintiff's costs, which said pleadings constitute a full, true and correct transcript of the records, files and proceedings of said Court in said cause, and all of which are on file with the Clerk of the District Court for the District of Alaska, Division No. 1, at Juneau;

IT IS ORDERED that all of the said pleadings, to wit, the amended complaint, demurrer and judg-

ment, be and they are hereby made the record in this cause.

AND IT IS FURTHER ORDERED that a copy of all of said papers be certified to by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, at Seattle, as the record in this cause, and transmitted to the Clerk of the United States Circuit Court of Appeals for [17] the Ninth Circuit under proper certificate, and that all of said records and papers be and constitute the record upon appeal herein from the said judgment.

FRED M. BROWN,

Judge.

[Endorsed]: Original. No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Order Settling Record for Appeal. Shackelford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. By ———, Deputy. [18]

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR B. CALLAHAM, for Himself and All Male Persons Residents of Juneau Precinct, Territory of Alaska, Over the Age of Twenty-one Years and Under the Age of Fifty Years,
Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,

Appellee.

Citation [on Appeal (Original)].

United States of America,

District of Alaska,—ss.

The President of the United States of America to
John B. Marshall, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and Ex-
officio Collector of Poll Tax, and to J. W. Rus-
sell, Esq., Attorney for said Party:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city of
Seattle, in the State of Washington, within thirty
(30) days from the date of this writ, pursuant to an
appeal filed in the Clerk's office of the District Court
for the District of Alaska, Division No. 1, wherein
the appellant and plaintiff above named, Arthur B.
Callaham, is appellant and you are the appellee, to
show cause, if any there be, why judgment in said
appeal mentioned should not be corrected and speedy
justice should not be done to the parties in that be-
half. [19]

WITNESS the Honorable EDWIN DOUGLASS
WHITE, Chief Justice of the Supreme Court of the

United States, this 8th day of August, 1913.

FRED M. BROWN,
Judge of the District Court for the District of
Alaska, Division No. 1.

Attest: E. W. PETTIT,
Clerk of the District Court for the District of Alaska,
Division No. 1. [20]

Due service of a copy of the within Citation is admitted this 8th day of August, 1913.

J. W. RUSSELL,
Attorney for Defendant and Appellee.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug 8, 1913. E. W. Pettit, Clerk. By ———, Deputy. [21]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
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one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Assignment of Errors.

Comes now the plaintiff, Arthur B. Callaham, in

the above-entitled action, and assigns the following errors as having been committed by the Court herein upon which he relies, and will rely, upon his appeal from the judgment made and entered by this Honorable Court on the 6th day of August, 1913:

1. The Court erred in sustaining the demurrer to the amended complaint;

2. The Court erred in rendering judgment against the plaintiff herein and in dismissing plaintiff's amended complaint.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,

Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Assignment of Errors. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

Due service of a copy of the within is admitted this 8th day of August, 1913.

J. W. RUSSELL,
Attorney for Deft. [22]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant.

Praeceptum for Transcript on Appeal.

Juneau, Alaska, August 8, 1913.

Clerk, District Court for the District of Alaska,
Division No. 1, Juneau, Alaska.

Dear Sir:

Please prepare the transcript of the record for appeal in the case of Arthur B. Callaham, for Himself and All Male Persons Residents of Juneau Precinct, Territory of Alaska, Over the Age of Twenty-one Years and Under the Age of Fifty Years, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Cause No. 1019-A, in the District Court, and certify the following papers, to wit:

1. Amended Complaint.
2. Demurrer to Amended Complaint.
3. Judgment.

4. Petition for Appeal.
5. Order Allowing Appeal.
6. Appeal Bond.
7. Order Confirming Settlement of Record on Appeal.
8. Citation.
9. Assignment of Errors.

When so prepared you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals [23] for the Ninth Circuit.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,

Attorneys for Plaintiff and Appellant.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913, E. W. Pettit, Clerk. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Praeceptum for Transcript on Appeal. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska. [24]

*In the District Court for the District of Alaska, Div.
No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All
Male Persons Residents of Juneau Precinct,
Territory of Alaska, Over the Age of Twenty-
one Years and Under the Age of Fifty Years,
Plaintiff and Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for
Juneau Precinct, Territory of Alaska, and
Ex-officio Collector of Poll Tax,
Defendant and Appellee.

**Certificate [of Clerk U. S. District Court to
Transcript of Record, etc.].**

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached twenty-four pages of typewritten matter, numbered from one to twenty-four, both numbers inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the appellant, filed herein and made a part hereof, in cause No. 1019-A, entitled Arthur B. Callaham, for himself and all male persons residents of Juneau Precinct, Territory of Alaska, over the age of twenty-one years and under the age of fifty years, plaintiff and appellant, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Defendant and Appellee.

I do further certify that the said record is by virtue of order allowing appeal and the citation issued herein and made a part hereof, and the return in accordance therewith.

I do certify that the said record has been prepared by me in my office, and the costs of preparation, examination and certificate amounting to Eleven and 60/100 dollars (\$11.60) will be paid by Messrs. Shackleford & Bayless, counsel for the plaintiff [25] and appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court this ninth day of August, nineteen hundred and thirteen.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,
Division Number One. [26]

[Endorsed]: No. 2305. United States Circuit Court of Appeals for the Ninth Circuit. Arthur B. Callaham, for Himself and All Male Persons Residents of Juneau Precinct, Territory of Alaska, Over the Age of Twenty-one Years and Under the Age of Fifty Years, Appellant, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division No. 1.

Received and filed August 18, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**
FOR THE NINTH CIRCUIT

ARTHUR B. CALLAHAM,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ARTHUR B. CALLAHAM for him-
self and all Male Residents of Ju-
neau Precinct,
Appellant,
vs.

JOHN B. MARSHALL, as United
States Commissioner for the Ju-
neau Precinct and Ex-officio Col-
lector of Poll Tax,
Apellee.

BRIEF OF APPELLANT AND PLAINTIFF IN ERROR

STATEMENT OF CASE

The two causes above entitled involve the same questions with reference to the validity of the attempted collection of poll tax in the Territory of Alaska for the year 1913, and for this reason the

brief herein has been entitled in both cases and the same brief filed in both of the causes above entitled. The case of Callaham against Marshall arose through injunction proceedings, seeking to enjoin the collection of the poll tax. The complaint in the case was demurred to by the defendant and the demurrer sustained, and judgment entered against the plaintiff, Callaham, and an appeal taken to this Court. The case of Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error, arose from a criminal information filed in the District Court for the District of Alaska, charging Callaham with the crime of wilfully and feloniously failing to pay his poll tax; to this information or complaint the defendant Callaham demurred and the demurrer was overruled and a judgment entered against Callaham. Pursuant to Section 97 of the Code of Criminal Procedure for the District of Alaska, Callaham sued out his writ of error.

The necessity of contesting the poll tax law within a short time gave rise to an order from the District Court setting the cases for disposition by the Circuit Court of Appeals at its next Seattle session. The short time allowed in which to bring this matter to issue at the Seattle session has compelled the plaintiff in error and appellant to write his brief before the printed record has reached him, but the record is so short that references to the pages of the record have been omitted; in each case the original pleadings, demurrer and judgment being the only matters of record before the lower court.

SPECIFICATION OF ERRORS

First: The lower court erred in overruling the demurrer of the defendant (a) to the complaint in the injunction case; (b), to the complaint or criminal information in the criminal case.

Second: The court erred in giving and entering judgment against the defendant upon the record herein (a) in the injunction case; (b), in the criminal case.

BRIEF AND ARGUMENT

The specification of errors above set forth raises two questions: first, that the poll tax law passed by the first legislature for the Territory of Alaska, approved May 1, 1913, violates the organic act providing for a legislature for the Territory of Alaska in that it provides for the levy and collection of the tax by the United States Commissioner, who is "a person who is holding a commission or appointment under the United States" and who, by the provisions of the poll tax act, holds an "office under the government of the Territory" of Alaska. The second proposition involved in these two cases is that the poll tax act, approved May 1, 1913, passed by the territorial legislature, provides for an annual tax which should be levied upon the first of March of each year in accordance with the provisions set forth in the said poll tax act, and that, therefore, the act did not contemplate the collection of said tax until after the first of March, 1914.

THE DESIGNATION OF UNITED STATES COMMISSIONERS AS POLL TAX COLLECTORS IS IN VIOLATION OF THE ORGANIC ACT PROVIDING FOR A LEGISLATURE FOR THE DISTRICT OF ALASKA.

When Congress provided for a legislative assembly for the District of Alaska, it placed certain limitations upon the power of that assembly, and, anticipating a probable tendency on the part of the legisla-

ture to impose additional duties upon the officers who had held their offices by virtue of congressional acts and anticipating the probable incompatibility of such duties, Congress provided by Section 11 of the organic act (37 Statutes at Large, page 512) that:

“No person holding a commission or appointment under the United States * * * * * shall hold any office under the government of said Territory.”

Among the various definitions of “office” which have been given by the authorities and which are collected in 29 Cyc. 1361-1364, are the following:

“A duty, charge or trust; a place of trust; a position to which certain duties are attached; a right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it; a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as those of bailiffs, receiver, and the like; * * * a position or appointment entailing certain rights and duties; * * * a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance; a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; * * * a particular duty, charge or trust, conferred by public authority and for public purpose. In a stricter legal sense an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental; a public station or employment conferred by the appointment of government; a right and duty confer-

red on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has fixed to the service; a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public; an appointment or authority on behalf of the government to perform certain duties; * * a special duty, trust, or charge, conferred by authority, and for a public purpose.”

From the foregoing definitions it is apparent that the Legislature has conferred upon the commissioners “a special duty, trust or charge” in prescribing that they shall collect poll taxes. Therefore, they have conferred upon the commissioners public offices. The fact that no particular name has been applied by the legislature to the persons designated to collect poll taxes is immaterial. The commissioners have been made collectors of poll taxes just as fully and truly as if the persons chosen to perform that duty were by the act specifically designated “collectors of poll taxes.” The office, namely, “the special duty, trust or charge”, has been created, and the commissioners have been chosen to perform the same; indeed, section 9 of the act explicitly recognizes the duty or charge laid by this act upon the commissioner as an office, for it provides that the commissioner before entering upon his duties shall give a bond “conditioned for the faithful discharge of the duties of his office”.

In *Shelby v. Aleorn*, 36 Miss. 273, the question arose whether under a statute similar to Section 11

of our organic act a person who held the office of senator in that state was eligible to the office of levee commissioner of a county in the state; and among other things the Court said:

“The law itself provides that the levee commissioner shall hold his office for the term of two years, under such restrictions as are herein prescribed. He is required to give bonds, and to discharge the duties of treasurer, in which position he is entitled to receive large sums of public money. The board of police, under the report of the levee commissioner as to the cost of the work to be done, is required to levy a sufficient tax to meet it; and he is required to take an oath ‘that he will in all things touching his office, seek to promote the best interests of his county and the State of Mississippi.’ These directions, of themselves, without doubt, define the character of the place of levee commissioner, and determine it to be an office.”

And this case is quoted with approval in *Attorney General v. Common Council* (Mich.) 70 N. W. 450, 452. And in 29 Cyc. 1386, it is said:

“One of the usual necessary formalities for the qualification of an officer is the taking of the official oath. One who is appointed or elected to office and does not take the required official oath does not possess the legal title to the office.”

And again it is said:

“An official bond is an obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office, or, as the term is used in statutes, the bond of a public officer. Generally the filing of the official bond is like the taking of the official oath regarded as a necessary prerequi-

site to the full legal title to the office. In the absence of a contrary statutory provision a person holding two separate offices must give two separate official bonds."

And in the same place it is said:

"The fact that the legislature imposes new duties upon an officer will not require him to take a new oath of office."

Therefore, it is manifest that the legislature itself considered the position of collector of poll taxes as an office, for it exacted a bond from the commissioner for the faithful performance of the duties of poll tax collector and clearly, under the authorities, the legislature correctly deemed the position an office—a new office; for if it had considered that the statute merely imposed new duties on the commissioner the legislature would not have exacted a new and separate bond.

The poll tax act is copied in full in the complaint in the injunction case and reference is made to the same for the purpose of ascertaining the provisions of the act. Section 9 of the act provides that the commissioner shall give a bond to the Territory of Alaska "for the faithful discharge of the duties of his office"; Section 10 provides that the commissioner shall keep an accurate account of all moneys received by him under the provisions of the poll tax act and receive as full compensation 15 per centum of all taxes collected.

It is plain to be seen that the provisions of this

act imposed upon the commissioner new duties not contemplated by the acts of Congress which had created the office of United States Commissioner many years before; that he was accountable not to the United States for the performance of these duties, but to the Territory and its officers alone.

The act of May 17, 1884, (23 Stat. L. p. 24), providing for civil government in the District of Alaska, Sec. 5, provided:

“There shall be appointed by the President four commissioners in and for said District, who shall have the jurisdiction and powers of commissioners of the United circuit courts in any part of said District.”

The act of Congress of June 6, 1900, making further provisions for civil government in Alaska, Sec. 6, provided:

“The respective judges of the court shall appoint and at their pleasure remove clerks, and commissioners in and for the District * * * * * The commissioners shall be ex-officio, justices of the peace, recorders, and probate judges.”

At the time of the passage of the act providing for the organization of the first territorial legislature it is self evident that any commissioner in the District of Alaska was a “person holding a commission or appointment under the United States.” The commissioners were the creations of the acts of Congress relating to Alaska, and were appointed by the United States judges, who were also creations of the

acts of Congress relating to Alaska and represented the United States in the Territory of Alaska and were accountable only to the United States. If the persons who held office under these organic acts were not persons "holding a commission or appointment under the United States", then there were no persons in the District holding commissions or appointments under the United States. All of the active duties connected with the levy and collection of this tax under the poll tax act were imposed upon the United States commissioners, and the result is that we have an act of the territorial legislature which, first, compensates the commissioners with fifteen per centum of all taxes collected and gives them a personal interest in the collection of all the taxes, which provides that they shall give such notices and take such action toward the distraint of property as shall end in the collection of the tax; and which makes it a crime to violate the provisions of the act levying the tax. The result, therefore, is that the United States commissioner occupies the position of tax collector for the Territory, is called upon to exercise the duties of a constable or marshal in seeing that the tax is collected, and finally, by reason of the criminal jurisdiction of the United States commissioner, he is made a judge of the guilt or innocence of any person who is charged with failing to pay his poll tax when at the same time he has a pecuniary interest in the collection of the tax. In addition to the duplicity of offices prohibited by Sec. 11 of the organic act providing for a territorial legislature, we

have also an incompatibility of offices which is in violation of the common law. By the act of Congress of June 6, 1900, 31 Stat. L. 321, 552, carried into Carter's Code, Part V., Sec. 567, and Compiled Laws of Alaska, Sec. 796, it is provided:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska.”

And at the common law two incompatible offices could not be held by the same person. The assumption of the second constituted and was ipso facto a vacation of the first office. The office of commissioner is incompatible with that of poll tax collector. For the commissionership is a judicial office and the poll tax collectorship is an executive office. If a person fails to pay his poll tax, the collector “must collect by seizure and sale of any personal property owned by such person, and any personal property thus seized shall be sold as provided by law for the sale of personal property in execution, except that three days’ notice of the time and place of sale shall be sufficient.” (Sec. 6.) Thus the collector is given the duties of a marshal—executive duties—to perform. And Section 12 makes any violation of the provisions of the act a misdemeanor. Therefore a failure to pay the tax would be a crime punishable in the court of the commissioner as *ex-officio* justice of the peace, i. e. the commissioner would be both the private prosecutor and the judge, for he would

naturally be the person who must swear to the complaint charging failure to pay the tax. Therefore we have this predicament: The commissoiner as executive officer demands the tax; payment is refused; as executive officer he makes and swears to a complaint before himself as a judicial officer and, conversely, as judicial officer he listens to himself as private prosecutor; and as judicial officer he tries the accused. He is at one and the same time and in the same proceeding private prosecutor, witness and judge. In effect he is a party in the case and the judge of his own case. Could two offices be more violently antagonistic and incompatible?

In *State v. Goff* (R. I.) 9 Atl. 226, 227, it is said:

“The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. In *Rex v. Pateman*, 2 Term R. 777, it was declared that, where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rex. v. Tizzard*, 9 Barn. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: ‘If the same person could hold both offices, he would in fact sit in judgment on his own acts.’ In England a sheriff’s duties are ministerial, and, to a limited extent, also judicial. While these

peculiar functions are recognized, in some cases, as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case. *Widow v. Clerks*, 1 Cro. Eliz. 76, case 38. * * *

“Under our law there is no such confusion of duties. In this state, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer’s return, and to allow or disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made by himself, if he were also judge, unless aided by special legislation.

* * * “We think the offices of justice of a district court and deputy sheriff are incompatible, and that, by accepting the latter, the respondent vacated the former.”

The same view was held in the case of *Stubbs v. Lee*, (Me.) 18 Am. Rep. 251, where the court said:

“The defendant having been appointed and sworn as a deputy-sheriff must be regarded as having accepted that office. By that acceptance he sur-

rendered the office of trial justice, a judicial office incompatible with that of a deputy-sheriff. His judicial authority, therefore, as a trial justice was at an end."

In his work on Public Officers, Mr. Mechem says, Sec. 422:

"Incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

And among the offices which he says the authorities have held to be incompatible, so that an acceptance of the second vacates the first, are the following: town clerk and alderman; trial justice and deputy-sheriff; justice of the peace and constable; justice of the peace and sheriff or deputy-sheriff; member of a prudential committee and auditor of a school district; state solicitor and member of congress, city alderman and city marshal; postmaster and judge of the county court.

We submit, therefore, that the poll tax act, which imposes all of the active and important duties of the collection of poll tax upon the United States commissioner, is void for the reason that it overrides the restrictions placed by Congress upon the territorial legislature and violates the principles of the common law.

SECOND: THE ACT OF THE ALASKA LEGISLATURE, PROVIDING FOR THE COLLECTION OF A POLL TAX IN THE TERRITORY, APPROVED MAY 1, 1913, DID NOT CON-

TEMPLATE THE COLLECTION OF A POLL
TAX PRIOR TO THE YEAR COMMENCING
MARCH 1, 1914.

The record in this case has been made up pro forma for the purpose of testing this law before the Circuit of Appeals we assume upon the theory that it was the duty of the District Court for the District of Alaska to sustain the law in favor of the contention of the tax collector and force the burden of the appeal upon the person protesting against the tax. There is nothing in the record to enlighten this Court or counsel for the plaintiff in error and appellant upon what ground the lower court proceeded in holding that it was a crime to refuse to pay a poll tax before March 1, 1914, and in holding that the tax was collectible prior to that date; and we are at a loss, therefore, to present any authorities except references to the provisions of the act itself, and we are unable to reach any other conclusion than that the legislature had no intention whatever of collecting the tax until the fiscal year provided in the act, commencing March 1st, 1914. In the first place, the act of Congress approved August 24, 1912, creating a legislative assembly in the Territory of Alaska (37 Stat. L. p. 512) provided that the first meeting of the legislative assembly should convene at the City of Juneau on the first Monday in March, 1913. Any act, therefore, which provided for the performance of certain essential duties prior to the first day of any month of March could not have been introduced

except with the intent that these duties could not be performed until the first day of March, 1914, for the reason that the first Monday in March, 1913, was the third day of March, 1913, and no member of the territorial legislature could have introduced an act (where the same contemplated the doing of certain things prior to any month of March) with the intention of the same having effect prior to the first day of March, 1914, for the reason that the legislature could not have been called to order until the third day of March, 1913. In view of this condition of affairs let us examine the poll tax act. Sec. 1 of the act provides:

“Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or territorial charges, within the Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.”

Section 2 then proceeds to provide the method of collecting the tax and is to be construed in the light of the well known rule of constitutional law that “due process requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him”. 8 Cyc, page 1134. Let us see then what the following section provides:

“Sec. 2. That the commissioner of each precinct

in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies.”

It is the evident intention from the section above quoted that the legislature contemplated that a roll of the persons subject to the poll tax should be made up before the first of March of each year, in duplicate, one to remain in the possession of the tax collector, and one to be transmitted to the Treasurer of the Territory; that this roll with reference to this particular tax was intended to take the place of and to be similar to the ordinary assessment rolls and made up so as to give due notice to any person inquiring as to whether he had been included in the assessment of the poll tax. It provided two offices in

which the persons levied upon would find their names and provided for a published notice which would put all persons upon inquiry as to whether they were included in the levy. It contemplated that the levy should apply only to persons residing in the District. Section 3 of the act provided:

“Sec. 3. The tax herein provided for shall be paid between the first Monday in April and the first Monday in the month of August in each year.”

It is to be remembered that the act became a law on the first day of May, 1913, and that the legislature could not have contemplated the payment of the tax during the month of April, 1913. Section 8 of the act provides as follows:

“The Territorial Treasurer must, before the first Monday in March of each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts.”

For the purposes of this record we assume that it is admitted that there was no Territorial Treasurer in the Territory of Alaska until the third day of July, 1913, as the allegations in the injunction case are undenied. Furthermore it may be deduced from the statutes of the United States referring to the District of Alaska that no Territorial Treasurer could exist prior to the third day of March, 1913; so that one of the prerequisites to the collection of this tax being the making up of a roll in each of the precincts before the first of March of each year, could not have been complied with and THE ATTEMPT

TO COLLECT THE TAX FOR THE YEAR 1913 COULD NOT POSSIBLY BE VALID.

“A levy cannot be based upon a list or roll not made until after the levy, although in the same year.” 37 Cyc., page 974.

“A statutory provision that the tax levy shall be made at a certain time of the year, or between certain dates, is generally held to be mandatory, so that a levy made at any other time is invalid.” 37 Cyc., page 975.

In view of these well known principles and in view of the evident intention of the territorial legislature to provide a systematic and formal way of collecting the tax by the performance of certain acts which could not occur until shortly prior to the first day of March, 1914, we submit that there is no ground whatever upon which to base the attempted collection of the tax or criminal prosecution of the plaintiff in error during the year 1913.

The only argument that has been advanced so far to sustain the validity of the attempted collection of the tax for the year 1913 is that of public necessity. The provisions of the act are so plain themselves that it would be nothing more or less than judicial legislation to hold that a poll tax could be collected before the first of March 1914. To say that on or about the first of May, 1913, the Alaska legislature intended to levy a tax for 1913 by the provisions of this act would be charging a body of intelligent men with giving no expression, indeed, to their intention.

It was within the power of the legislature to

have changed the date for the making up of the rolls to the first of July, 1913, or to any other date subsequent to the passage of the act, which would have made such intention clear and unequivocal. To ask that the courts hold that such intention is clear, namely, to levy a tax for the year 1913, is, we respectfully submit, an unwarranted request or tax upon the imagination of the courts.

Respectfully submitted,

ARTHUR B. CALLAHAM,

In propria personam.

LEWIS P. SHACKLEFORD,

Z. R. CHENEY,

W. S. BAYLESS,

Attorneys for Plaintiff in Error
and Appellant.